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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

NO. 76-5729

MARK DAVID OLIPHANT and DANIEL B. BELGARDE,
Petitioners,

v.

THE SUQUAMISH INDIAN TRIBE, et al,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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OPINIONS BELOW

Oliphant v. Suquamish Indian Tribe, et al. The opinion of the Ninth Circuit Court of Appeals is not yet published. The opinion of the District Court is unpublished. Both opinions are included in Appendix "A" of the Petition for Writ of Certiorari.

Belgarde v. Suquamish Indian Tribe, et al. This case is now pending before the Ninth Circuit Court of Appeals, Cause No. 75-3319. The Order Denying Writ of Habeas Corpus of the District Court is unreported and is included in Appendix "A" of the Petition for Writ of Certiorari.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI IN BELGARDE V. THE SUQUAMISH INDIAN TRIBE

Petitioner has requested a Writ of Certiorari to the Ninth Circuit Court of Appeals in Belgarde v. The Suquamish Indian Tribe at the preliminary stages of that appeal. Judgment has not been rendered in that case by the Court of Appeals and, in fact, the parties have not yet submitted briefs to that Court. The first paragraph of the opinion of the Ninth Circuit Court of Appeals in Oliphant v. The Suquamish Indian Tribe states that it involves jurisdiction over non-Indians "while on tribal land within the boundaries of the reservation." The issue of jurisdiction over a non-Indian who commits a crime within the boundaries of a reservation but not on "tribal land" was not presented in Oliphant. That, however, is precisely the issue raised in Belgarde and the Ninth Circuit should not be deprived of the opportunity to render judgment on that separate issue.

Petitioner Belgarde has clearly not met the strict standard of Rule 20 of Supreme Court Rules, having failed to show "that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this Court."

The remainder of this Brief in Opposition, consequently, will deal only with the issues raised in Oliphant.

QUESTIONS PRESENTED

Petitioner, a non-Indian residing on the Port Madison Indian Reservation, was arrested by Suquamish Indian Tribal Police during the annual Tribal Celebration and was charged with assaulting a police officer and resisting arrest. The offense took place on the Suquamish Tribal Encampment Grounds, which is held in trust by the United States for the benefit of the

Suquamish Indian Tribe.

1. Does the Suquamish Tribe have the power to vest its Tribal Court with jurisdiction over Petitioner's offense?

2. Has Congress extinguished the jurisdiction of the Suquamish Tribe over Petitioner's offense?

3. Has the State of Washington assumed exclusive jurisdiction over Petitioner's offense?

4. Is the exercise of jurisdiction by the Suquamish Tribe over Petitioner's offense consonant with express congressional and executive policies?

TREATIES, STATUTES, AND ORDINANCES INVOLVED

The following treaties, statutes and ordinances are set out in full in Appendix "B" attached to the Petition for Writ of Certiorari.

Treaty of Point Elliott, 12 Stat. 927 (1859);

Indian Reorganization Act, 25 U.S.C. § 476;

General Crimes Act, 18 U.S.C. § 1152, and predecessor acts;

Public Law 83-280, 67 Stat. 588, specifically, 18 U.S.C. §1162;

Indian Civil Rights Act, 25 U.S.C. § 1302, 1323;

Revised Code of Washington, Ch. 37.12;

Constitution and By-Laws of the Suquamish Indian Tribe of the Port Madison Indian Reservation (July 2, 1965);

Suquamish Law and Order Code.

STATEMENT OF THE CASE

Petitioner, a non-Indian residing on the Port Madison Indian Reservation, was involved in an altercation on the Suquamish Tribal Encampment Grounds, which is held in trust by the United States for the benefit of the Suquamish Indian Tribe. A Suquamish Tribal policeman called to the scene was assaulted by

Petitioner, and Petitioner was arrested for assaulting a police officer and resisting arrest. These events took place in 1973 during the annual Suquamish Tribal Celebration known as Chief Seattle Days, while a number of Indians were encamped on the Tribal grounds participating in the Celebration.

Petitioner was arraigned under the Suquamish Tribal Law and Order Code in the Suquamish Tribal Court and bail was set in the amount of $100.00 for each charge. Petitioner did not post bail and was incarcerated for a period of five days in the jail of the City of Bremerton as a prisoner of the Suquamish Indian Tribe, under an agreement between the City of Bremerton and the Bureau of Indian Affairs, providing for the holding of tribal prisoners in the jail facility. Petitioner was then released on his personal recognizance by order of the Suquamish Tribal Court.

Petitioner then sought a writ of habeas corpus in the United States District Court For the Western District of Washington under 25 U.S.C. §.1303. He based his application for the writ upon a challenge to the jurisdiction of the Suquamish Indian Tribal Court; specifically, he claimed that the Tribe lacked jurisdiction over a non-Indian committing an offense against an Indian on reservation land held in trust by the United States Government for the benefit of the Tribe.

The District Court denied the writ, holding that the Suquamish Tribal Court had such jurisdiction and that the rights of the Petitioner had not been violated.[1]

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1. Petitioner raised additional claims of procedural due process violations which were rejected by the District Court. The decision of the District Court on those claims was not appealed, and they are not in issue before this Court.

The United States Court of Appeals for the Ninth Circuit affirmed. The Court reasoned that the jurisdiction of the Suquamish Indian Tribe over this matter had not been withdrawn by treaties or acts of Congress and that such power therefore remained in the Tribe at this time.

Although the District Court denied Petitioner's request for a stay of the Tribal Court proceedings, the Suquamish Tribal Court voluntarily held the tribal prosecution against the Petitioner in abeyance, pending the outcome of the federal litigation. That prosecution is still being held in abeyance, and the Petitioner remains free on his personal recognizance.

The Port Madison Indian Reservation was established for the Suquamish Indian Tribe in the State of Washington pursuant to the Treaty of Point Elliott, 12 Stat. 927 (1859). The Suquamish Indian Tribe is a federally-recognized Indian tribe organized under the Indian Reorganization Act of 1934, 25 U.S.C. § 476, and operating under a constitution and by-laws approved by the Undersecretary of the Interior on July 2, 1965.[2] The Tribe has established a valid justice and law enforcement program on the Reservation by enactment of an approved Law and Order Code[3] and the establishment of a police system and Tribal Court.

The Suquamish Indian Tribal Council acts as the local government on the Port Madison Indian Reservation. The Tribe qualifies as a unit of local government under the Revenue Sharing Act of 1971 (86 Stat. 919, 924) and under the Omnibus Crime Control and Safe Streets Act of 1968 (82 Stat. 197, 209) and receives federal funds for the improvement of law enforcement on

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2. Petition, App. "B" at 6.

3. Petition, App. "B" at 39.

the Reservation. Its Tribal judges participate in national Indian tribal judges' seminars and institutes and its Tribal policemen are trained at Indian police academies and participate in additional in-service training.

ARGUMENT

The issue in the present case is simply whether a federally-recognized local government has the right to protect the peace and safety of its citizens by prosecuting under its laws a person who voluntarily enters the territorial jurisdiction of that government and commits an offense. That the government is an Indian tribe, and the alleged perpetrator a non-Indian, cannot change the nature of the case into one compelling Supreme Court review.

It should be noted at the outset that Petitioner does not here allege that his right to due process of law was violated and does not attack the criminal procedures followed by the Tribe. Rather, Petitioner takes the novel position that since his race differs from that of the government controlling the land on which he committed his offense, he is immune from prosecution by that government.

Although it is true that the exact issue presented by this case has not been decided by this Court, the basis for the Ninth Circuit's decision is contained in decisions of this Court spanning 150 years of litigation on matters of Indian jurisdiction. A review of these decisions compels denial of the Petition for Writ of Certiorari.

I. THE SUQUAMISH TRIBE HAS INHERENT POWER TO VEST ITS TRIBAL COURT WITH JURISDICTION OVER PETITIONER'S OFFENSE.

As succinctly stated in the Ninth Circuit decision, the issue presented by this case is determined by resolution of

the following questions: What were the original sovereign powers of the Tribe and, then, how far and in what respects have these powers been limited?[4]

As this Court has stated, sovereignty is the "backdrop" against which cases involving Indian jurisdiction must be viewed. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973). There can be no argument that Indian tribes possessed all of the original inherent powers of any sovereign nation. One of the attributes of that sovereignty was the power to preserve order by punishing those who violate tribal law. This Court has stated previously that not only do Indian tribes have general criminal jurisdiction, but that "if the crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive" Williams v. Lee, 358 U.S. 217, 220 (1959).

These concepts of sovereignty were first recognized in a case which became the foundation for the development of basic principles of Indian law in this country, Worcester v. Georgia, 31 U.S. 515 (1833), in which Chief Justice Marshall stated that Indian tribes continue to possess those sovereign powers that are neither inconsistent with their status nor expressly terminated by Congress.

For a number of years, many of these inherent sovereign powers of Indian tribes were not exercised as the United States Government began to take a firm grasp of the administration of Indian affairs. In 1934, the Indian Reorganization Act was passed, 25 U.S.C. §476, resulting in the revitalization of tribal self-government.

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4. Petition, App. "A" at 9.

But it was not until the passage of the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302, and the providing of technical and financial assistance to Indian tribal governments and law enforcement agencies that tribes such as the Suquamish Tribe began to assert many of the governmental powers which had been lying dormant during the years of federal paternalism.

After many years of ineffective federal and state law enforcement on the isolated Port Madison Indian Reservation, the Suquamish Tribe found it necessary to pass a Tribal code to regulate the conduct of persons within its territorial jurisdiction. The Tribal code defines as offenses activities which would ordinarily be deemed to be petty offenses or misdemeanors in other jurisdictions. Furthermore, in accordance with 25 U.S.C. § 1302, penalties are limited to a maximum of six months imprisonment and/or a $500 fine.

When the Tribe planned its annual Chief Seattle Days Celebration, it expected thousands of people to congregate in a small area on the Tribal Encampment Grounds for the Celebration. Requests were made of state, county, and federal law enforcement officials for law enforcement assistance. The Tribe was told that it would have to provide its own law enforcement out of Tribal funds and with Tribal personnel.

Therefore, when Petitioner committed his offense, the only law enforcement officers available to deal with the situation were Tribal deputies. Without the exercise of jurisdiction by the Tribe, there would have been no law enforcement whatsoever on the Reservation during this major gathering, clearly creating a danger to public safety.

The realities of such a situation, occurring repeatedly on Indian reservations throughout the country, justify the support of tribal jurisdiction by the District Court and the Ninth Circuit.

In cases dealing with tribal jurisdiction, this Court has consistently rejected the notion that the non-Indian status of a party somehow deprives the tribe of jurisdiction which otherwise it would clearly have. In Williams v. Lee, supra, this Court held that jurisdiction over a civil suit between a non-Indian and an Indian resided with the tribal court:

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. (Citations omitted). The cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since.
>
> If this power is to be taken away from them, it is for Congress to do it.

358 U.S. at 223.

More recently, in United States v. Mazurie, 419 U.S. 544 (1975), this Court upheld the jurisdiction of an Indian tribe over non-Indians regarding the regulation of the sale of liquor. Moreover, this Court specifically rejected the notion that the tribe's power is diminished by the non-Indian status of one of the parties. The Court cited Williams v. Lee, supra, noting that it held that "the authority of tribal courts could extend over non-Indians insofar as concerns their transactions on a reservation with Indians." 419 U.S. at 558.

The only case which has ever deviated from this principle was Ex parte Kenyon, 14 F.Cas. 353 (C.C.W.D.Ark. 1878).

However, just a few years later when given the opportunity to comment on Kenyon, this Court in Elk v. Wilkins, 112 U.S. 94 (1884), noted that the decision in Kenyon depended on the fact that the activity for which the non-Indian was being punished actually took place outside the boundaries of a reservation.

Also, Congress has repeatedly acted in a manner consistent with the existence of tribal jurisdiction over non-Indian activities. For example, consider the 1968 Indian Civil Fights Act, 25 U.S.C. §1302. Until the passage of that Act, the traditional authority of an Indian tribe was not subject to constitutional civil rights limitations. Talton v. Mayes, 163 U.S. 376 (1896). That Act, in effect, extended a modified version of the Bill of Rights to Indian tribal governments. As the legislative history of that Act clearly shows, it was intended to establish rights for all persons who would become subject to the jurisdiction of tribal government, whether Indian or non-Indian. In fact, the original bill provided for protections only for "American Indians"; however, it was later changed to provide for broader protection for "any person." See Dodge v. Nakai, 298 F.Supp. 17, 24 (D.Ariz. 1968).

The decision of the Ninth Circuit is thus supported by the decisions of this Court, as well as the actions of Congress.

II. CONGRESS HAS NOT EXTINGUISHED THE JURISDICTION OF THE SUQUAMISH TRIBE OVER PETITIONER'S OFFENSE.

Petitioner suggests that Congress, by extending federal criminal jurisdiction to Indian country, has stripped Indian tribes of the right to exercise concurrently their criminal jurisdiction over reservation trust land. However, Petitioner points to no act of Congress which has expressly withdrawn that inherent tribal jurisdiction.

Petitioner then urges this Court to infer such Congressional action. The basis for this position is that when Congress extended general federal criminal jurisdiction to Indian reservations, it somehow by implication ended the tribe's own jurisdiction in this area. However, Petitioner fails to demonstrate that the existence of general federal criminal jurisdiction is inconsonant with the concurrent jurisdiction of another governmental authority. Certainly, the Ninth Circuit's analysis of the legislative history of the General Crimes Act, 18 U.S.C. §1152, shows that Petitioner's argument is not meritorious.

Furthermore, the statutes and cases discussed above clearly indicate that both Congress and this Court have never considered tribal power to be extinguished upon the extention of federal power over Indian reservations. Rather, it has been consistently presumed that tribes retain concurrent authority in such circumstances.

In fact, Petitioner's theory leads inexorably to the conclusion that Indian tribes have been deprived of criminal jurisdiction not only over non-Indians, but also over tribal members over whom general federal criminal jurisdiction has also been extended. Clearly, Congress never so intended; and the decisions of this Court supporting tribal authority refute Petitioner's contention. Williams v. Lee, supra.

III. THE STATE OF WASHINGTON HAS NOT ASSUMED EXCLUSIVE JURISDICTION OVER PETITIONER'S OFFENSE.

Petitioner claims that even if the Tribe inherently had jurisdiction over his offense and that this jurisdiction continued concurrently after the extension of general federal

criminal jurisdiction, nevertheless, such tribal jurisdiction was terminated by the State's assumption of federal jurisdiction under Public Law 83-280, 67 Stat. 588. Petitioner points to no decision of this Court or of any of the Circuit Courts supporting his theory. Indeed, there are none.

In the first place, the State of Washington has not assumed jurisdiction over matters occuring on Tribal trust land on the Port Madison Indian Reservation.

It is true that, in 1958, the Suquamish Tribe, pursuant to RCW Ch. 37.12 (the State statute authorizing assumption of jurisdiction under the terms of Public Law 83-280) requested the State to assume jurisdiction over the Reservation. However, with the growth of the Indian self-determination movement in the 1960's, the Tribe realized its mistake and requested the Governor to proclaim retrocession of criminal and civil jurisdiction over the Reservation back to the United States. On August 26, 1971, Governor Daniel J. Evans proclaimed that retrocession, which was accepted on April 14, 1972, by the United States. This acceptance was published, in accordance with the terms of 25 U.S.C. § 1323, the retrocession statute. 37 F.R. 7353 (1972).

The Attorney General of the State of Washington later opined that Governor Evans lacked authority to retrocede such jurisdiction and that such action would have to be taken by the Legislature. However, the United States had already accepted the retrocession. The decision below upheld the retrocession citing the decisions in United States v. Brown, 334 F.Supp. 536, 540-41 (D.Neb. 1971) and Omaha Tribe of Nebraska v. Walthill, 334 F.Supp. 823 (D.Neb. 1971), aff'd 460 F.2d 1327 (8th Cir. 1972), cert. denied, 409 U.S. 1107 (1973). Those cases

involved identical issues of the official acceptance of retrocession by the United States and a later determination by the State that the State procedure for such retrocession had not been properly followed by the State Government. The Court in those cases held:

> . . .[O]nce the Secretary received from the state officials what appeared to be an official act of the state offering a retrocession, he was entitled to rely thereon for purposes of the acceptance authorized by the federal statute.

334 F.Supp. at 832.

Secondly, it is irrelevant whether state jurisdiction has been assumed under Public Law 83-280. The legislative history of that Act makes it clear that the intent was merely to allow the states to assume the federal portion of the concurrent jurisdiction being shared by Indian tribes and the Federal Government. Williams v. Lee, supra. There is no indication in Public Law 83-280 or its history that there was any intention to deprive Indian tribes of their share of jurisdiction and to allow states to assume a greater share of jurisdiction, i.e., exclusive jurisdiction, than the United States Government had at the time. The object was merely to relieve the federal courts and federal prosecutors of the burdens of law enforcement in Indian country. This is particularly true in light of the canon of Indian law that "statutes passed for the benefit of dependent Indian tribes are to be liberally construed, doubtful expressions being resolved in favor of the Indians." Bryan v. Itasca County, _____U.S._____, 96 S.Ct. 2102, 48 L.Ed.2d 710, 723 (1976).

A determination that the jurisdiction assumed by states under Pubic Law 83-280 is exclusive would result in the

termination of Indian tribal governments, for there would be no powers remaining to be exercised by such tribal governments. This Court has already spoken emphatically on this issue in Bryan v. Itasca County, supra, stating that nothing in the legislative history of Public Law 83-280 "remotely" suggests that Congress meant that the Act's extension of jurisdiction to the states "should result in the undermining or destruction of such tribal governments as did exist and a conversion of the affected tribes into little more than 'private, voluntary organizations'." 48 L.Ed.2d at 721.

IV. THE EXERCISE OF CRIMINAL JURISDICTION BY THE SUQUAMISH TRIBE IS CONSONANT WITH EXPRESS CONGRESSIONAL AND EXECUTIVE POLICIES.

This Court noted in Bryan v. Itasca County, supra, at n.14, that "present federal policy appears to be returning to a focus upon strengthening tribal self-government," and cited several recent Congressional acts supporting this conclusion.

A number of acts passed by the Congress in the early 1950's had contemplated the termination of Indian reservations and the eventual cessation of the powers of tribal governments. However, in the 1960's there was a major reversal of this governmental policy and approach toward Indian affairs, culminating in a message to Congress by the President on July 8, 1970, indicating a policy of the strengthening of tribal sovereignty and tribal institutions. H.R. DOC. NO. 91-363, 91st Cong., 2d Sess. (1970).

In Bryan, this Court cited the following language of the Ninth Circuit in Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (9th Cir. 1975):

> courts "are not obligated in ambiguous circumstances to strain to implement [an assimilationist] policy Congress has now rejected,

> particularly where to do so will interfere with the present congressional approach to what is, after all, an on-going relationship."

48 L.Ed.2d at 721, n.14.

CONCLUSION

Petitioner is attempting to convince this Court to reject notions of tribal sovereignty, tribal jurisdiction, federal policy, and legislative interpretation which support the decision below. However, Petitioner fails to acknowledge that such rejection would require this Court to overrule a long line of its decisions dealing with Indian jurisdiction, the powers of Indian tribal government, and the relationship between federal and tribal authority. Moreover, the basic principles emerging from those decisions have recently been reaffirmed in the decisions of this Court discussed above.

It should be noted that there is no decision of any other Circuit conflicting with the Ninth Circuit's decision in this case. In fact, Petitioner's allegation that this case is of such great moment and public import so as to require review by this Court is impeached by the notable absence of litigation in other courts concerning this subject matter, despite the exercise of jurisdiction by Indian tribes over non-Indians throughout the nation over the past several years.

It is evident that the issues in this case do not presently merit Supreme Court review. Perhaps, if other decisions arise in other Circuits conflicting with the Ninth Circuit or dealing with further implications of such tribal jurisdiction, the Supreme Court will wish to take another look at these issues.

This Court should not review the well-reasoned and judicially sound opinion of the Ninth Circuit protecting the

right of an Indian tribe to maintain a safe and orderly community by regulating the conduct of those who choose to enter its lands.

For the reasons set out above, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ZIONTZ, PIRTLE, MORISSET,
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Dated:
December 22, 1976

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